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MESSAGE ENVY, LLC

9  
10 UNITED STATES DISTRICT COURT  
11 SOUTHERN DISTRICT OF CALIFORNIA

12 Gail Hahn, individually and on behalf of all  
13 other similarly situated California residents,

14 Plaintiff,

15 v.

16 Massage Envy Franchising LLC, a  
17 Delaware limited liability company;  
18 Massage Envy, LLC, a Delaware limited  
liability company,

19 Defendants.  
20

CASE NO. **'12CV0153 MMAJMA**

**NOTICE OF REMOVAL**

21  
22 Defendants, MESSAGE ENVY FRANCHISING LLC and MESSAGE ENVY,  
23 LLC (collectively, "Massage Envy"), pursuant to 28 U.S.C. § 1441, hereby remove to this  
24 Court the state action described below, which falls within the original jurisdiction of this  
25 Court and thus is properly removed under 28 U.S.C. §§ 1332, 1441, 1446 and 1453.

26 Pursuant to 28 U.S.C. § 1446(d), copies of this Notice of Removal are being served  
27 on Plaintiff's counsel of record and filed with the Clerk of the Superior Court of the State  
28

1 of California in and for the County of San Diego, as an exhibit to a Notice of Filing Notice  
2 of Removal. A copy of said Notice of Filing (without exhibits) is attached hereto as  
3 **Exhibit A.**

4 **PROCEDURAL BACKGROUND**

5 1. Plaintiff, GAIL HAHN ("Plaintiff"), brought this action on December 7,  
6 2011 in the Superior Court of the State of California in and for the County of San Diego by  
7 filing a putative class action complaint (the "Complaint") styled as *Gail Hahn, individually*  
8 *and on behalf of all other similarly situated California Residents v. Massage Envy*  
9 *Franchising, LLC and Massage Envy LLC*, Case No. 37-2011-00102080-CU-BT-CTL.

10 2. Defendants were served with a Summons and Complaint on December 20,  
11 2011. As required by 28 U.S.C. §§ 1446(a), true and correct copies of the complete state  
12 court file are attached hereto as **Exhibit B.**

13 3. Pursuant to 28 U.S.C. § 1446(b), this Notice of Removal is timely because it  
14 is being filed within 30 days after Defendants' receipt of a copy of the Complaint, which is  
15 the initial pleading that sets forth the claims for relief upon which this action is based.

16 4. In addition, pursuant to 28 U.S.C. § 1441(a), the Notice of Removal is  
17 properly filed in this Court because the Superior Court of the State of California in and for  
18 the County of San Diego is located within this Court's jurisdiction. *See* 28 U.S.C. § 84(d).

19 **ALLEGATIONS OF THE COMPLAINT**

20 5. Plaintiff asserts three claims for relief against Defendants: (i) unlawful  
21 business practices in violation of California's Unfair Competition Law (codified at Cal.  
22 Bus. & Prof. Code § 17200 *et seq.*) ("UCL"); (ii) unfair business practices in violation of  
23 the UCL; and (iii) breach of the implied covenant of good faith and fair dealing.

24 6. These claims are based on Massage Envy's development of membership  
25 materials used by independent franchisees in California. In return for a recurring monthly  
26 membership fee, customers are entitled to receive one massage per month, and book  
27 additional monthly massages at a reduced rate. Unused massages roll over into succeeding  
28

1 months so long as the customer remains a Massage Envy member, and the customer's  
 2 membership dues are current. These provisions are express in the membership contract  
 3 signed by each Massage Envy member. (*See* Declaration of Jeffrey Frankel, attached  
 4 hereto as **Exhibit C** ("Frankel Decl."), at ¶ 6.)

5 7. Plaintiff claims that she was enrolled in the California membership program  
 6 for over two years, but ultimately "forfeited" her unused massages when she cancelled her  
 7 membership. (Complaint, ¶ 9.) Plaintiff contends that the loss of her membership benefits  
 8 after she was no longer a Massage Envy member constitutes an improper liquidated  
 9 damages penalty in a consumer contract prohibited by Cal. Civ. Code §§ 1671(c) and (d).  
 10 Plaintiff theorizes that the imposition of these alleged liquidated damages amounts to an  
 11 unlawful and unfair business practice in violation of the UCL. (Complaint, ¶ 2.)

12 8. Plaintiff seeks to represent a class of consisting of:

13 All California residents, from December 7, 2007 to the present,  
 14 who were enrolled in a Massage Envy membership program  
 15 and forfeited paid-for massages because they did not keep their  
 membership current by making timely payments.

16 (Complaint, ¶ 23.)

17 9. Plaintiff requests the following relief: (i) compensatory damages, and as to  
 18 senior citizen members of the putative class, treble damages pursuant to Cal. Civ. Code  
 19 § 3345; (ii) restitution and/or disgorgement; (iii) an injunction prohibiting "forfeiture" of  
 20 massages and from continuing to engage in unlawful and unfair business practices; (iv)  
 21 other equitable relief as the Court deems proper, including reinstatement of "forfeited"  
 22 massages on behalf of Plaintiff and the putative class members and imposition of a  
 23 constructive trust upon Defendants' revenue obtained from the unlawful and unfair  
 24 business practices in which they allegedly engaged; (v) pre- and post-judgment interest;  
 25 (vi) attorneys' fees and costs, including expert witness fees; and (vii) "[s]uch other and  
 26 further relief as this Court may deem just and proper." (Complaint, § VI.)

1           10. As demonstrated below, this action meets the requirements for removal  
2 under federal law and thus is properly removed to this Court.

3                                   GROUND FOR REMOVAL

4           11. This action falls within the original jurisdiction of this Court under the Class  
5 Action Fairness Act ("CAFA"), Pub. L. No. 109-2, 119 Stat. 4 (2005) (codified at 28  
6 U.S.C. §§ 1332(d) and 1453). In order to properly remove an action under CAFA, several  
7 requirements must first be satisfied. The removing party must show that (i) the matter  
8 qualifies as a class action, (ii) the putative class has a minimum number of members, (iii)  
9 the citizenship of at least one member of the class is diverse from at least one defendant,  
10 and (iv) the amount in controversy exceeds \$5,000,000, exclusive of interest and costs. As  
11 set forth below, Defendants are entitled to remove this action.

12           12. Must be a Class Action. CAFA applies only to class actions, which are  
13 defined as "any civil action filed under rule 23 of the Federal Rules of Civil Procedure or  
14 similar State statute or rule of judicial procedure authorizing an action to be brought by 1  
15 or more representative persons as a class action." 28 U.S.C. §§ 1332(d)(1)(B) and 1453(a).  
16 Here, Plaintiff has styled the Complaint as a "Class Action Complaint" and alleges that the  
17 case is being brought "as a class action pursuant to California Code of Civil Procedure  
18 382." (Complaint, ¶ 23.) This action therefore meets the definition of a class action under  
19 CAFA.

20           13. Must Have a Certain Number of Class Members. Pursuant to 28 U.S.C.  
21 §§ 1332(d)(5)(B), CAFA requires the number of class members to exceed 100. Here,  
22 Plaintiff alleges that she "is informed and believes that there are thousands of members in  
23 the proposed Class." (Complaint, ¶ 24.) Accordingly, the class membership requirement  
24 has been satisfied.

25           14. Citizenship of Class Members Must be Diverse. The requirement of  
26 diversity of citizenship under CAFA is met in this action because "any member of a class  
27 of plaintiffs is a citizen of a State different from any defendant." 28 U.S.C.  
28

1 § 1332(d)(2)(A). Indeed, Plaintiff purports to represent a putative class limited just to  
 2 "California residents." (Complaint, ¶ 23.) Neither defendant in this case is a citizen of  
 3 California. Instead, Massage Franchising, LLC is a Delaware limited liability company  
 4 with its principal place of business located in Scottsdale, Arizona. (Complaint, ¶¶ 11, 13;  
 5 *see also* Frankel Decl., ¶ 5.) Massage Envy, LLC is a Delaware limited liability company  
 6 with its principal place of business located in New York, New York. (Frankel Decl., ¶ 5.)  
 7 Under 28 U.S.C. §§ 1332(d)(10), Defendants are considered citizens of Delaware and  
 8 Arizona, and Delaware and New York, respectively, and therefore are diverse from  
 9 Plaintiff and the putative class. *See Davis v. HSBC Bank Nevada*, 557 F.3d 1026 (9th Cir.  
 10 2009) (stating that CAFA abrogates the traditional rule that an unincorporated association  
 11 shares the citizenship of each of its members; instead, under 28 U.S.C. §§ 1332(d)(10), an  
 12 association is a citizen of the state where it maintains its principal place of business and the  
 13 state under whose laws it is organized); *Roling v. E\*Trade Secs., LLC*, 756 F. Supp. 2d  
 14 1179 (N.D. Cal. 2010) (noting that a limited liability company is an "unincorporated  
 15 association" under 28 U.S.C. §§ 1332(d)(10)).

16 15. Amount in Controversy Must Exceed a Minimum Threshold. CAFA  
 17 requires the amount in controversy to exceed \$5,000,000, exclusive of interest and costs.  
 18 28 U.S.C. § 1332(d)(2). In determining that amount, the claims of the individual class  
 19 members are aggregated. *Id.*, § 1332(d)(6). In this case, Plaintiff seeks compensatory  
 20 damages, restitution and/or disgorgement, injunctive relief, and other equitable remedies,  
 21 including reinstatement of unused massages and the imposition of a constructive trust upon  
 22 Defendants' revenues from the massages at issue. (Complaint, § VI(B).) Plaintiff also  
 23 seeks treble recovery on all damages awarded to senior citizen members of the putative  
 24 class under Cal. Civ. Code § 3345, and attorneys' fees. (Complaint, §§ VI(D) and (F).)

25 16. Here, assuming that the claims raised by the Complaint have merit (and  
 26 Defendants deny that they do), the minimum threshold for the amount in controversy has  
 27 been satisfied, considering compensatory damages alone. Indeed, the damages at issue for  
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1 the putative class, consisting of those customers of California franchise locations who were  
 2 enrolled in Massage Envy membership programs from December 7, 2007 to the present  
 3 but whose accounts were past-due and/or cancelled, and who therefore, in accordance with  
 4 the terms of their membership contracts, were no longer able to use membership benefits,  
 5 exceeds \$5,000,000, exclusive of interest and costs. (Frankel Decl., ¶¶ 7, 8.)<sup>1</sup>

6 When combined with the treble damages that Plaintiff seeks with respect to certain  
 7 class members, and the attorneys' fees requested by Plaintiff's counsel, the potential  
 8 amount in controversy is even higher. *See, e.g., Grant v. Capital Mgmt. Servs.*, No. 11-  
 9 56200, 2011 U.S. App. LEXIS 18366, at \*3 (9th Cir. Sept. 2, 2011) (citing *Chabner v.*  
 10 *United of Omaha Life Ins.*, 225 F.3d 1042 (9th Cir. 2000) (noting that treble damages may  
 11 be considered in determining the amount in controversy requirement under CAFA));  
 12 *Valikhani v. Qualcomm Inc.*, No. 08CV786, 2008 U.S. Dist. LEXIS 64686, at \*11-12 (S.D.  
 13 Cal. Aug. 21, 2008) (same); *Kroske v. U.S. Bank Corp.*, 432 F.3d 976, 980 (9th Cir. 2005)  
 14 (including attorneys' fees in the calculation of the amount in controversy); *Tompkins v.*  
 15 *Basic Research*, No. S-08-244, 2008 U.S. Dist. LEXIS 81411, at \*12 (E.D. Cal. Apr. 22,  
 16 2008) (same). Moreover, Plaintiff also requests injunctive relief prohibiting Defendants  
 17 from allowing "forfeiture" of future massages. If granted, such relief could impact  
 18 Defendants' business and operations and result in substantial additional expense, which  
 19 would add further to the amount in controversy in this action. *See Rippee v. Boston*  
 20 *Market*, 408 F. Supp. 2d 982, 984 (S.D. Cal. 2005) (citing the Report of the Senate  
 21 Committee on the Judiciary on CAFA, noting that the amount in controversy requirement  
 22 may be established "either from the viewpoint of the plaintiff or the viewpoint of the  
 23  
 24

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25 <sup>1</sup> Where, as here, the complaint does not contain any specific amount of damages sought, the  
 26 party seeking removal must demonstrate, by a preponderance of the evidence, that the amount in  
 27 controversy is satisfied. *Lewis v. Verizon Comm'ns*, 627 F.3d 395, 397 (9th Cir. 2010). The Ninth  
 28 Circuit has held that a declaration is sufficient to show the potential damages may exceed the  
 jurisdictional amount. *See id.*

1 defendant, and regardless of the type of relief sought (e.g., damages, injunctive relief, or  
2 declaratory relief.").

3 Accordingly, the amount of controversy requirement under 28 U.S.C. § 1332(d)(2)  
4 has been satisfied. The potential damages in this case exceed \$5,000,000, exclusive of  
5 interest and costs.

6 CONCLUSION

7 17. For the reasons set forth above, this action falls within the original  
8 jurisdiction of this Court pursuant to CAFA, and therefore is properly removed under 28  
9 U.S.C. §§ 1332, 1441, 1446 and 1453.

10 WHEREFORE, Defendants, MESSAGE ENVY FRANCHISING LLC and  
11 MESSAGE ENVY, LLC, respectfully request that this Court proceed with this matter as if  
12 the Complaint had been originally filed in the U.S. District for the Southern District of  
13 California.

14 Dated: January 18, 2012

15 SHEPPARD, MULLIN, RICHTER & HAMPTON LLP

16  
17 By s/ John C. Dineen  
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